

1 UNITED STATES DISTRICT COURT  
2 EASTERN DISTRICT OF VIRGINIA  
3 ALEXANDRIA DIVISION

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4 UNITED STATES OF AMERICA )  
5 v. ) Case No. 1:14-cr-246  
6 WILLIAM ANDREW CLARKE, ) Alexandria, Virginia  
7 Defendant. ) November 7, 2014  
8 ) 9:19 a.m.  
9 )  
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11 TRANSCRIPT OF HEARING  
12 BEFORE THE HONORABLE CLAUDE M. HILTON  
13 UNITED STATES DISTRICT JUDGE  
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19 APPEARANCES:

20 For the United States: Matthew J. Gardner, Esq.  
21 Scott A. Claffee, Esq.

22 For the Defendant: Karin R. Porter, Esq.  
23 David B. Benowitz, Esq.  
24 Defendant William Andrew Clarke,  
25 in person

26 Court Reporter: Tracy L. Westfall, RPR, CMRS, CCR  
27 Proceedings reported by machine shorthand, transcript produced  
28 by computer-aided transcription.

1 P R O C E E D I N G S

2 THE CLERK: Criminal No. 2014-246, *United States of*  
3 *America v. William Andrew Clarke.*

4 MR. GARDNER: Good morning, Your Honor. Matt Gardner  
5 and Scott Claffee for the United States.

6 THE COURT: Good morning.

7 MS. PORTER: Good morning, Your Honor. Karin Porter  
8 for Mr. Clarke, who is present before the Court, along with my  
9 cocounsel, David Benowitz.

10 MR. BENOWITZ: Good morning, Your Honor.

11 THE COURT: This comes on on your motion?

12 MR. BENOWITZ: Good morning again, Your Honor.

13 THE COURT: You can go ahead. I think --  
14 Go ahead.

15 MR. BENOWITZ: Thank you, Your Honor.

16 Your Honor, as we've stated in our motion to continue  
17 this trial for approximately 60 to 75 days, that about two days  
18 before we conducted the motions hearing in this case, the D.C.  
19 Circuit issued an opinion in *United States v. Hite*, H-I-T-E.

20 We learned of the decision on the day it came out and  
21 we immediately took action. Because in that decision, the D.C.  
22 Circuit vacated Mr. Hite's conviction for violating 18 U.S.C.  
23 2422(b), which is the same charge that Mr. Clarke faces in this  
24 case, in part because the district court excluded a defense  
25 expert, Dr. Frederick Berlin, a board-certified psychiatrist.

1           The proffered testimony in that case is the same  
2 testimony that we would proffer in this case, which is that  
3 there is a difference between the desire to actually engage in  
4 sexual activity with a minor and mere fantasy and role-playing,  
5 and that the defendant does not suffer from any psychiatric  
6 conditions that are associated with a desire to have sexual  
7 conduct with children or that may predispose an individual to  
8 want to engage in sexual activity with a child.

9           The next day, the day after the opinion came down, we  
10 contacted Dr. Berlin. He has been retained by us to evaluate  
11 Mr. Clarke. Unfortunately, he cannot testify. He's not  
12 available to testify until either February 19th or  
13 February 27th.

14           We notified government counsel of our intent to file  
15 this motion on the day that we conducted the motions hearing in  
16 this case. That would have been October 24, 2014, so a few days  
17 after the opinion came down.

18           Unfortunately, Your Honor, the defense did its due  
19 diligence in this case. We had retained, initially, retained  
20 another expert in this case. He conducted a thorough evaluation  
21 of Mr. Clarke. He came up with much the same results that the  
22 expert came up in *Hite*. Unfortunately, only after he conducted  
23 the evaluation, he told -- did he tell us that he would not be  
24 able to testify, that he's precluded from testifying in a trial,  
25 which totally sandbagged the defense.

1 THE COURT: What precludes him from testifying in a  
2 trial?

3 MR. BENOWITZ: According to the expert, the standards  
4 of his -- the organization that he belongs to. He's been in  
5 practice, I believe, for over 30 years. And he -- again, I've  
6 used this --

7 THE COURT: What organization does he belong to that  
8 all of his colleagues don't belong to?

9 MR. BENOWITZ: Excuse me, Your Honor. He informed us  
10 that the practice standards, and, again, this is something we've  
11 stated in our motion, the practice standards for the association  
12 of the treatment of sexual abusers ethically precluded him from  
13 testifying during the guilt phase of a criminal trial.

14 We had absolutely no idea of this. Of course, we would  
15 not have retained this expert.

16 THE COURT: Doesn't your other expert belong to that  
17 same society?

18 MR. BENOWITZ: We don't believe so, Your Honor. And he  
19 has informed us from the outset that he is available to testify  
20 as, of course, he testified in *Hite* -- or he would have  
21 testified in *Hite*.

22 Your Honor, again, we acted immediately upon evaluating  
23 the *Hite* opinion. We were totally sandbagged by our initial  
24 expert. We believe Dr. Berlin is an essential witness for the  
25 defense and essential to our effort to fulfill Mr. Clarke's

1 Sixth Amendment right to present a trial in this case.

2 We understand the government opposes our motion, and we  
3 submit that the prejudice to the government is minimal in this  
4 case that would result from a short continuance. There's no  
5 victim or civilian witness testifying, which we're aware of,  
6 testifying for the government that has an interest in the matter  
7 being resolved in December or that would be affected in any way.

8 We've notified the government over five weeks --  
9 actually, we've -- actually, almost seven weeks before the -- I  
10 apologize -- over five weeks before the trial of our intent to  
11 file this motion. So we're certainly not surprising the  
12 government.

13 And the minimal prejudice to the government is  
14 outweighed enormously by the prejudice that would be incurred to  
15 Mr. Clarke from our inability to put on this expert, Your Honor.

16 THE COURT: All right.

17 MR. GARDNER: Thank you, Your Honor. The government's  
18 opposed to the continuance. We're happy to go whenever is  
19 convenient for the Court, including the scheduled trial date.

20 Here, it doesn't appear that there's any reason for the  
21 defense to have gotten an expert earlier, one that they knew  
22 could testify at trial. In particular, there's no reason,  
23 practically or constitutionally, that they need Dr. Berlin.

24 This is an expert that's actually at issue in the D.C.  
25 Circuit case. There are, presumably, lots of experts in this

1 area. There's no reason that they need Dr. Berlin, the one that  
2 happened to be mentioned by the D.C. Circuit.

3 There's no expert notice yet in this case so we don't  
4 know precisely what his qualifications are and exactly what he  
5 would testify to. It's a little early to judge that. But there  
6 are definite concerns that his testimony would be relevant at  
7 all in this trial.

8 In particular, the one area that defense counsel just  
9 mentioned is that they're proposing Dr. Berlin would examine  
10 Mr. Clarke and testify about his mental state, which is  
11 prohibited under 704(b). It goes to the ultimate issue of the  
12 case. That's for the jury to decide. That's actually exactly  
13 what the *Hite* case decided as well, the D.C. Circuit case.

14 They did allow for the expert or would have allowed for  
15 the expert to testify in general that there's fantasy on the  
16 Internet. It's not clear how that's relevant here necessarily.

17 But as to the piece about needing to examine Mr. Clarke  
18 to testify about his intent, that's just not allowed by 704(b)  
19 or the D.C. Circuit. So there's no need for Mr. Berlin or any  
20 other expert to actually do a psych examination of Mr. Clarke at  
21 this stage. It's just unnecessary at this point because there's  
22 no way an expert can testify about that at trial.

23 With that said, Your Honor, the government's happy to  
24 go forward.

25 THE COURT: Well, you apparently think they're entitled

1 to a continuance because their expert won't come and testify,  
2 the one that they've got. They ought to be given some time to  
3 get an expert.

4 MR. GARDNER: We're happy to go whenever is convenient  
5 for the Court.

6 THE COURT: Well, I think if we're in that situation,  
7 and I believe that's right, I don't suppose it hurts to go a  
8 little longer. We're going into the holidays anyway. It isn't  
9 going to make much difference if we do it one way or another,  
10 does it?

11 MR. GARDNER: On that point, that's correct. This is  
12 not a case with live victims where it would be a much different  
13 situation. It was an undercover operation. So in that sense,  
14 that is correct.

15 THE COURT: I think -- what did you say? He's  
16 available the middle of February?

17 MR. BENOWITZ: Your Honor, Dr. Berlin is available  
18 February 19th -- I misspoke earlier. He's available  
19 February 19th through February 27th. So the end of the third  
20 full week in February and all of the last week in February.

21 THE COURT: Let's set this for February the 23rd then.  
22 This is going to be a one-day case?

23 MR. GARDNER: The government's case-in-chief will be  
24 less than a day, yes.

25 THE COURT: So be prepared for -- I'm not going to wait

1 on your expert now. He's going to have to be here.

2 MR. BENOWITZ: That's fine.

3 THE COURT: So be prepared for the 23rd, February 23rd.

4 MR. BENOWITZ: Thank you, Your Honor.

5 MR. GARDNER: Thank you, Your Honor.

6 THE COURT: Do I understand he waives any speedy trial  
7 rights that he may have --

8 MR. BENOWITZ: That's correct, Your Honor.

9 THE COURT: -- in connection with this motion?

10 MR. BENOWITZ: That's correct.

11 THE COURT: All right.

12 MR. BENOWITZ: Thank you.

13 THE COURT: That takes care of our criminal business.

14 We'll stand in recess till 10 o'clock.

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16 (Proceedings concluded at 9:28 a.m.)

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/s/

Tracy L. Westfall    OCR-USDC/EDVA